Any purported notice that EPA may have provided in the preamble to the Proposed Guidance that section 132.4(h) only applies to pollutants identified in the future is immaterial for interpreting an unambiguous regulation.

C. EPA ignores the principle of *stare decisis.*

EPA also claims that the Sixth Circuit's decision "raises no legal issue of recurring importance," because "the court of appeals did not announce any general rule defining the circumstances under which documents like the SID may be consulted. . . ." Opp. 10 & 14.[3] This argument ignores the hallmark principle of *stare decisis.* As this Court has stated, "it is undisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (*superseded on other grounds*) (quoting The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)). Pursuant to this bedrock principle, the Sixth Circuit's decision, if left to stand, will enable circuit and district courts to invoke this precedent to allow an agency's informal interpretation to overcome the unambiguous language of a regulation. Further, the Sixth Circuit and its corresponding district courts will be bound by the Sixth Circuit's analysis. As a result, the Sixth Circuit's decision

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3. EPA is correct when it states that the Sixth Circuit did not announce a general rule, and therein lies the central problem with the Sixth Circuit's analysis. If the Sixth Circuit had consulted the established general rule in *Christensen*, it would not have deferred to EPA's interpretation of section 132.4(h) as contained in the SID.

will cause a recurring issue in the federal court system that erodes well-established administrative law.[4]

D. The Sixth Circuit's decision was not harmless error.

EPA also suggests that the Sixth Circuit's interpretation of section 132.4(h), if found to be incorrect, was harmless error. Specifically, EPA claims that even if the scientific indefensibility exclusion of section 132.4(h) is applicable to WET testing procedures, "Indiana's proposal would be rejected because the State's approach was insufficiently protective of aquatic resources and was not 'in accordance with applicable national regulations.'" Opp. 13 (quoting Pet.

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4. EPA also argues that IWQC is not challenging EPA's application of the GL Guidance to Indiana's proposed regulatory scheme, but is challenging the GL Guidance itself. Opp. 12. The Sixth Circuit, however, addressed this issue and found EPA's argument "unconvincing." Pet. App. 7a. Specifically, the Sixth Circuit held:

> Although the EPA is correct in noting that many of the petitioners' arguments originate in the language of the Guidance, this is because the Guidance provides the frame of reference to which the Indiana and Ohio procedures must be compared. That the Guidance is held to some degree of scrutiny does not necessarily make this action a challenge to its validity. To the contrary, petitioners' briefs nowhere suggest that they contest the legitimacy of the Guidance. Dismissing this case on the basis that it is an overbroad challenge to the Guidance itself would thus be inappropriate.

Id. Similarly before this Court, IWQC does not challenge the validity of section 132.4(h), but rather challenges the Sixth Circuit's misapplication of section 132.4(h) to Indiana's final WET rule.

App. 56a). The Sixth Circuit, however, did not reach any decision on the merits of whether Indiana's WET procedure was adequate under section 132.4(h), instead ruling that section 132.4(h) only applies to pollutants identified in the future based on EPA's interpretation in the SID and the preamble to the Proposed Guidance. Pet. App. 15a-16a. Contrary to EPA's assertions, a reversal of the Sixth Circuit's decision by this Court regarding section 132.4(h) is necessary so that the Sixth Circuit can review the merits of whether EPA improperly disapproved Indiana's proposed WET testing procedures.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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